IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 41357-4-II

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00039-4

BRIEF OF RESPONDENT

BRIAN PATRICK WENDT, WSBA # 40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Respondent

SERVICE	
	Ms. Jodi Backlund Backlund & Mistry PO Box 6490 Olympia, WA 98507

This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left.

I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: January 30, 2012,
at Port Angeles, WA

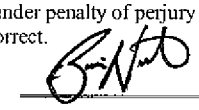

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases: **Page(s)**

Washington Cases: **Page(s)**

Constitutional Provisions: **Page(s)**

Statutes: **Page(s)**

Other Authority: **Page(s)**

I. COUNTERSTATEMENT OF THE ISSUES.

1. Did the trial court's decision to impose a five-year firearm enhancement on the defendant's first-degree assault conviction violate double jeopardy?

2. Did the trial court violate double jeopardy prohibitions by sentencing the defendant for first-degree assault and attempted first-degree murder when both convictions were supported by different evidence?

3. Did the trial court's pattern jury instructions that defined a "substantial step" as "conduct that strongly indicates a criminal purpose" relieve the State of its burden of proof with respect to the charge of attempted first-degree murder?

4. Did the trial court's instructions, which advised the jury that it had a "duty" to convict if it found the State proved each element of the crimes alleged, violate the defendant's right to an impartial jury?

5. Did the defendant receive ineffective assistance of counsel when his attorney introduced evidence of the defendant's good character and law-abiding behavior via three defense witnesses?

6. Did the trial court err in finding the defendant's two offenses constituted the "same criminal conduct" when (1) the defendant committed two separate and distinct crimes, (2) the defendant committed his two crimes in different locations, and (3) the defendant manifested two different criminal intents?

///

///

///

///

II. STATEMENT OF THE CASE.

Facts

Scott Davis (the defendant) suffers from mental illness: bipolar and posttraumatic stress disorder (PTSD). RP (7/28/2010) at 70, 79. In 2008's waning months, the defendant's mental health was deteriorating. *See e.g.* RP (7/28/2010) at 10-14, 16-17, 19, 21-28, 31-35, 38-39, 43, 50-52, 54, 56-58. However, despite his worsening condition, Davis was not eligible for civil commitment. RP (7/28/2010) at 81-82.

On January 15, 2009, Davis drove his sport utility vehicle (SUV) to the "Lonesome Creek" campground on the Quileute Reservation. RP (7/21/2010) at 5-6, 20. Shortly thereafter, a campground employee contacted La Push Police Department to resolve a "registry dispute." RP (7/21/2010) at 5-6.

Officer Michael Foster found Davis at his campsite. RP (7/21/2010) at 5-6. Davis approached the officer and handed him his military identification. RP (7/21/2010) at 6. Foster explained to Davis that he had paid for a tent campsite, but was occupying a space reserved for recreational vehicles. RP (7/21/2010) at 7. Davis replied that he had no problem paying an additional fare, but said he was angry because the campground employee had disrespected him. RP (7/21/2010) at 7.

While Officer Foster and Davis continued to discuss the matter, the officer noticed three long rifles resting on a picnic table behind the defendant. RP (7/21/2010) at 7. When Foster inquired about the guns, Davis replied that they were loaded. RP (7/21/2010) at 7.

Officer Foster politely asked Davis to unload the guns and secure them in his vehicle. RP (7/21/2010) at 7. The officer explained the park was currently hosting a number of tourists and he did not want them to feel threatened or intimidated. RP (7/21/2010) at 7. Davis agreed. RP (7/21/2010) at 8. However, the defendant offered to turn the guns over to the police for safekeeping. RP (7/21/2010) at 8.

Later that afternoon, Davis visited the police department and surrendered the three rifles. RP (7/21/2010) at 9. At the station, Davis told Foster that he suffered from PTSD. RP (7/21/2010) at 9, 13. Davis then said, "if he did not take his medication he would put a bullet in his head or somebody else's." RP (7/21/2010) at 9-10. Before leaving the station, Davis assured Foster he had surrendered all the guns in his possession. RP (7/21/2010) at 11.

Believing Davis might be suicidal, Police Chief William Lyon visited the defendant the next day. RP (7/21/2010) at 21, 27. Davis waived Lyon over to his campsite and introduced himself. RP (7/21/2010) at 21.

Lyon thanked Davis for surrendering his weapons voluntarily.[1] RP (7/21/2010) at 21. Davis affirmed it was no problem and said he did not want anybody to get hurt. RP (7/21/2010) at 21. *See also* RP (7/21/2010) at 25.

During the conversation, Chief Lyon observed another rifle lying on the picnic table. RP (7/21/2010) at 21-22. Lyon asked Davis why he had kept this particular gun. RP (7/21/2010) at 21. Davis explained it was merely a small hunting rifle. RP (7/21/2010) at 22. When Lyon asked if Davis had any other weapons, the defendant became angry and stated, "I don't see the need for these questions[.]" RP (7/21/2010) at 22. Davis then said he planned to leave the Quileute Reservation in order to camp around Lake Ozette. RP (7/21/2010) at 23.

Chief Lyon reminded Davis to collect his rifles before he left the campground. RP (7/21/2010) at 23. Davis said Officer Foster was welcome to keep the guns. RP (7/21/2010) at 23. When Lyon informed Davis that department policy prohibited such gifts, the defendant replied, "I've been to hell, now I've found Heaven, and if I don't come back Officer Foster can have them." RP (7/21/2010) at 23.

---

[1] According to Chief Lyon, this was the first time a camper/visitor had ever agreed to surrender firearms because they might hurt themselves or others. RP (7/21/2010) at 24.

On January 18, 2009, Davis visited a small store – Ray's Grocery – alongside Highway 112 in Sekiu, Washington. RP (7/21/2010) at 112. Davis told Joel Ray, a store clerk, that he was new to the area and looking to rent a cabin along the Strait of Juan de Fuca.[2] RP (7/21/2010) at 113. Ray informed Davis that there were some cabins available just down the road. RP (7/21/2010) at 114. Davis promised to pass by the store on his way back from Neah Bay so he could obtain more information about these rental properties. RP (7/21/2010) at 114.

Three hours later, Davis returned to the grocery. RP (7/21/2010) at 115-16. Ray offered Davis the phone number of the landlord that owned the rental properties. RP (7/21/2010) at 117. Davis insisted the number was not necessary because he had "rangered (sic) it." RP (7/21/2010) at 117. Ray understood this to mean that Davis had already entered one of the cabins. RP (7/21/2010) at 117-18.

While at the grocery, Davis exhibited strange and erratic behavior. RP (7/21/2010) at 59-61, 120. When Davis told Anita Rogers, another clerk, that he had moved into one of the abandoned cabins near the store, she quickly informed him that the property had not been deserted. RP (7/21/2010) at 61. Davis insisted he would pay the owner when he met

[2] Davis also shared that he had served in the military, suffered from PTSD, and was taking medication. RP (7/21/2010) at 114-15. Ray believed Davis was under the influence of his medication due to his disjointed speech. RP (7/21/2010) at 115, 120-21.

him, but stated he was unwilling to sleep outside in the cold. RP (7/21/2010) at 61.

Dave Sperline received two phone calls concerning his rental properties in Sekiu: one from Ray's Grocery, the second from the public utility department (PUD). RP (7/21/2010) at 70, 72-73. Sperline, in turn, contacted the Clallam County Sheriff's Office in Forks and reported that someone had broken into one of his properties and taken-up residence. RP (7/21/2010) at 73. Deputy Bill Cortani promised to investigate the matter. RP (7/21/2010) at 73. *See also* RP (7/22/2010) at 46-47.

On January 19, 2009, Deputy Cortani investigated the reported trespass. RP (7/26/2010) at 80, 82. Cortani arrived at the Sekiu property in the early afternoon and informed his dispatch officer that he was on the scene. RP (7/26/2010) at 85-86. *See also* RP (7/22/2010) at 47. Cortani observed that a sliding glass door was open on the eastside of the property. RP (7/26/2010) at 86. Cortani reported to dispatch that the cabin door was ajar and he intended to enter the property. RP (7/26/2010) at 86-87, 125. *See also* RP (7/22/2010) at 47. Cortani then drew his firearm, holding it "depressed ready,"[3] and made his approach. RP (7/26/2010) at 87-88, 128.

[3] Holding a firearm "depressed ready" means to keep an unholstered firearm at the officer's side and pointed toward the ground. RP (7/26/2010) at 88.

Before Deputy Cortani entered the cabin, he heard footsteps rapidly approaching from the westside of the property. RP (7/26/2010) at 87. Davis rounded the corner of the cabin, asking the deputy if he could be of service. RP (7/26/2010) at 88.

Deputy Cortani identified himself has a member of the sheriff's office and that he was investigating a trespass. RP (7/26/2010) at 89. Davis said the matter had been resolved, claiming he was renting the property and waiting for the landlord to contact him. RP (7/26/2010) at 89. Cortani informed Davis that he had spoken with the property owner and knew that no one had permission to occupy the cabin. RP (7/26/2010) at 89. *See also* RP (7/21/2010) at 75, 78. Cortani then asked Davis for identification. RP (7/26/2010) at 89, 126-27.

Davis replied he was a retired major in the U.S. Army and did not have to comply with the deputy's request. RP (7/26/2010) at 89-90, 125-26. Davis then demanded that Cortani holster his service weapon. RP (7/26/2010) at 90.

Deputy Cortani responded that he did not know with whom he was dealing and repeated his request for identification. RP (7/26/2010) at 90. Again, Davis stated he did not need to listen to the deputy and began walking away. RP (7/26/2010) at 90. Cortani followed and reiterated his

request for identification. RP (7/26/2010) at 90. Davis refused to stop and walked around the corner of the cabin. RP (7/26/2010) at 90-91, 122.

As Davis walked away, he kept his arms at 90 degrees to his side. RP (7/26/2010) at 90-91. Because Davis was only passively resisting, Cortani holstered his service weapon and drew his Taser. RP (7/26/2010) at 91, 129. Cortani then radioed dispatch that he had an individual in custody. RP (7/26/2010) at 133, 139.

Deputy Cortani activated his Taser and informed Davis that he was under arrest. RP (7/26/2010) at 91-92, 131, 135. Cortani then instructed Davis to place his hands on his head. RP (7/26/2010) at 92. Cortani warned the defendant that he would fire the Taser if he failed to comply with the officer's demands. RP (7/26/2010) at 92.

Davis began to move his hands toward his head. RP (7/26/2010) at 92. Suddenly, Davis reached for an object near his waist. RP (7/26/2010) at 92-93. As Davis turned toward Cortani, the deputy saw the defendant was gripping the handle of a gun. RP (7/26/2010) at 93, 123.

Deputy Cortani fired his Taser. RP (7/26/2010) at 92-93. Cortani heard the darts make a "clickity noise," but the Taser failed to incapacitate Davis. RP (7/26/2010) at 93. Cortani cursed as Davis proceeded to draw his gun. RP (7/26/2010) at 93. Davis smiled saying, "you're right, oh shit." RP (7/26/2010) at 94, 115, 120.

Davis then fired his gun at sheriff's deputy. RP (7/26/2010) at 94. Cortani screamed as he felt his left arm exploded in pain. RP (7/26/2010) at 94. Cortani dropped his Taser and tried to draw his side arm. RP (7/26/2010) at 94, 122.

Davis pointed his gun at Cortani's head and fired a second time. RP (7/26/2010) at 94. Remarkably, Cortani managed to duck the second shot. RP (7/26/2010) at 94-95, 122. Cortani ran toward the beach as Davis continued to fire a barrage of bullets from his location on the cabin's deck. RP (7/26/2010) at 95-96. As Cortani ran toward a beach log, approximately 50 feet away, he felt a "sting" in the back of his hip. RP (7/21/2010) at 95; RP (7/26/2010) at 97.

Deputy Cortani returned fired from behind the beach log. RP (7/26/2010) at 95-97. At some point, Cortani performed a tactical reload. RP (7/26/2010) at 9-100. As Cortani struggled to reload his gun, Davis continued to fire at his position. RP (7/26/2010) at 98. Cortani saw Davis flinch twice after the deputy had resumed the firefight. RP (7/26/2010) at 100.

After running out of ammunition, Davis retreated to the cabin's interior through the opened sliding door.[4] RP (7/26/2010) at 100-01.

[4] The police recovered a semi-automatic handgun in grass near the residence. 2RP (7/20/2010) at 12; RP (7/21/2010) at 54. The gun's slide was locked in the back position. RP (7/21/2010) at 54.

Immediately, Cortani sought a more protected position further down the log behind its root ball. RP (7/26/2010) at 101. Cortani radioed dispatch, reporting that he was in a firefight and injured. RP (7/26/2010) at 101-02. *See also* RP (7/22/2010) at 48.

Davis soon exited the cabin carrying a shotgun. RP (7/26/2010) at 102. Davis kept the stock of the gun against his shoulder and marched toward the deputy's last known position. RP (7/26/2010) at 102. From the other end of the log, Cortani ordered Davis to drop the weapon. RP (7/26/2010) at 103. Davis turned toward the deputy and raised the shotgun. RP (7/26/2010) at 103-104.

Again, Cortani opened fire. Davis ran forward and dove behind some rough terrain. RP (7/26/2010) at 103. *See also* RP (7/21/2010) at 125-26, 139. Because Davis continued to point his shotgun in the deputy's general direction, Cortani kept firing on the defendant's position. RP (7/26/2010) at 103-04. Davis soon called out that he was hurt and needed help. RP (7/26/2010) at 105. Davis then tossed his shotgun to the side. RP (7/26/2010) at 103, 106.

Deputy Cortani informed Davis that help was on the way. RP (7/26/2010) at 106. Cortani then radioed dispatch to send two ambulances

to his location. RP (7/26/2010) at 106. *See also* RP (7/21/2010) at 163; RP (7/22/2010) at 6.

Numerous law enforcement agencies responded to the shooting. *See e.g.* RP 2RP (7/20/2010) at 5-7; RP (7/21/2010) at 122-23, 134-36; RP (7/22/2010) at 49-50. Officers located Cortani on the beach, pointing his service weapon at an individual lying on the ground. RP (7/21/2010) at 125-26. In the same area, the officers recovered a shotgun from amongst the driftwood. RP (7/21/2010) at 92, 127, 142, 167, 172; RP (7/22/2010) at 28, 55, 86-87; RP (7/26/2010) at 44-45. The shotgun was loaded, and the defendant's blood was inside the barrel where he had inserted a single cartridge. RP (7/22/2010) at 139-43; RP (7/26/2010) at 46.

As responding officers cleared the cabin, they discovered a large amount of blood on the deck and inside the rental property. RP (7/21/2010) at 42, 88; RP (7/22/2010) at 73, 88-90, 92, 105-06, 109-11. The officers also located an SUV parked alongside the cabin with the driver's side door open and the engine running. RP (7/21/2010) at 54, 125, 138; RP (7/22/2010) at 57.

Medics tended to the injuries of both men. Cortani had suffered two gunshot wounds: (1) the first bullet hit his left arm and exited below his shoulder; and (2) the second bullet hit his lower back, 2 inches from

his spine, and exited through his hip. RP (7/26/2010) at 88. *See also* RP (7/22/2010) at 21.

Initially, the medics believed Davis had expired at the scene. RP (7/21/2010) at 167; RP (7/22/2010) at 9, 27. However, Davis responded to their treatment. As medics addressed his injuries, they asked Davis a series of questions to assess his level of consciousness. RP (7/21/2010) at 167; RP (7/22/2010) at 32. Davis answered each question appropriately. RP (7/21/2010) at 168; RP (7/22/2010) at 32. At all times, he was oriented as to time and place, and he knew the medics were attempting to help him. RP (7/21/2010) at 168; RP (7/22/2010) at 38.

Davis told the medics that he wished he had killed the deputy. RP (7/21/2010) at 170; RP (7/22/2010) at 36. According to Davis, he would have succeeded had his gun not jammed after he ran out of ammunition. RP (7/22/2010) at 36.

Inside the ambulance, the medics attempted to administer an intravenous solution. RP (7/22/2010) at 14. These efforts were frustrated because Davis had already been secured in handcuffs. RP (7/22/2010) at 14. John Brunk asked Davis "if he was done being stupid" so he could have the handcuffs removed. RP (7/22/2010) at 14. Davis answered that "he was done being stupid" but "he wasn't as stupid as the officer who

tried to tase him through his leather jacket. RP (7/22/2010) at 14. *See also* RP (7/22/2010) at 36

As the medics transported Davis to a local medical clinic, Davis asked to be airlifted to Madigan Army Hospital. RP (7/21/2010) at 170; RP (7/22/2010) at 18, 36-37. Davis explained that his father was a retired military surgeon, and he believed that Madigan was the only place he would receive fair treatment in light of his actions. RP (7/22/2010) at 37. At no point did the medics observe evidence that Davis was suffering from hallucinations or delusional thinking.[5] RP (7/22/2010) at 18, 38.

The State subsequently charged Davis with one count of first-degree assault and one count of first-degree attempted murder. CP 95-97.

Trial

Davis informed the trial court that his defense was "not guilty by reason of insanity" (NGRI). RP (7/14/2010) at 10; 1RP (7/19/2010) at 15; 1RP (7/20/2010) at 12.

Prior to trial, the State moved the court to preclude testimony regarding the defendant's good character (*i.e.* military service record, employment with school district, etc.). 1RP (7/19/2010) at 16-17. The defense opposed the motion. 1RP (7/19/2010) at 17. The trial court

[5] The medics looked for such evidence because the defendant repeatedly said he had served in the military. RP (7/22/2010) at 38.

granted the motion, but allowed the defense to introduce testimony to contrast the defendant's behavior in the months leading to the shooting with his past behavior in "better times" – before the onset of his illness or when he was still able to manage his condition with medication. 1RP (7/19/2010) at 19-21. *See also* RP (7/28/2010) at 6-7, 9.

The State also moved *in limine* to preclude the defense from presenting argument that would encourage jury nullification. RP (7/19/2010) at 23. The trial court granted the motion, explaining jurors have a duty to accept and apply the law as given by the judge. 1RP (7/19/2010) at 23-24. *See also* 2RP (7/19/2010) at 10, 13; 2RP (7/20/2010) at 100.

At trial, Davis called two family members to testify that he was rapidly decompensating in the weeks leading to the shooting. *See* RP (7/28/2010) at 10-17, 19, 21-29, 31-35, 38-39, 43-44, 50-54, 56-60. The relatives explained that this behavior was uncharacteristic of the man they knew before the onset of his illness, or when he took his medication. *See* RP (7/28/2010) at 13-15, 20, 28-29, 36-37, 39-40, 45, 52, 55, 57. The defense expert, Dr. Ken Muscatel, echoed this testimony, explaining that Davis was able to serve his country honorably for 20 years, and work as a computer specialist for a school district for 15 years because his mental illness did not manifest itself until late in life. RP (7/28/2010) at 69-72, 74.

Additionally, Dr. Muscatel opined Davis did not pose a risk to the community so long as he took his medication. RP (7/28/2010) at 106-08.

With respect to the NGRI defense, the defense relied primarily on Dr. Muscatel's testimony. Dr. Muscatel testified that Davis was in a full manic state, and likely psychotic, at the time of the shooting. RP (7/28/2010) at 85-86, 88-89, 112. However, the doctor clarified there was no evidence of delusional thinking. RP (7/28/2010) at 88, 112, 121.

Dr. Muscatel explained to the jury that "the devil is in the details" with respect to any NGRI finding because the more time that passed during the shooting the more opportunity there was for deliberate, organized, goal oriented action on the part of the defendant. RP (7/28/2010) at 94-95. Dr. Muscatel opined that Davis was not insane at the time of the incident if the jury accepted Deputy Cortani's description of events.[6] RP (7/28/2010) at 95, 120. However, if the jury accepted Davis'

[6] This is because Davis would have understood the wrongfulness of his actions. RP (7/28/2010) at 94-95. Additionally, Dr. Muscatel testified that if Davis actually approached and greeted the officer, such a fact would weigh against a finding that he believed his life was actually threatened. RP (7/28/2010) at 118-19. Similarly, if the deputy holstered his firearm and subsequently drew his Taser, this fact too would argue against a finding that Davis believed his life was in jeopardy. RP (7/28/2010) at 119. Dr. Muscatel also noted that Davis had the opportunity to escape after Cortani had fled the battlefield. RP (7/28/2010) at 117. However, the defendant's decision to retrieve a shotgun was an aggressive action. RP (7/28/2010) at 117. Finally, the fact Davis actually opened the shotgun to either load a cartridge, or check that it was loaded, showed an intentional deliberate, and goal directed behavior. RP (7/28/2010) at 117-18.

account, Dr. Muscatel believed the defendant was likely insane at the time of the initial shooting.[7] RP (7/28/2010) at 95.

However, Dr. Muscatel stated the defendant's own version of events was problematic for an NGRI finding:

> [W]hat he described was a kind of a sudden act where he felt threatened and there was gunfire. He pulled his gun because he thought he was going to get killed or hurt. So he pulls his gun, ... now you've got a gun fight going on and during that period of time ... there's more opportunity to figure out what's going on. What have I done, I need to stop, ... and go[] somewhere, the house, the car, ... [but he] comes back with a shotgun. That's a separate act. That suggests that he knows he's in the gun fight and he makes some choice to either continue the gun fight or defend himself. That suggests some cognition, planning[,] and purposeful behavior for sure.

RP (7/28/2010) at 115. According to Dr. Muscatel, this behavior suggests "more deliberation and more reactivity to what [was] going on which could be consistent with premeditation." RP (7/28/2010) at 114. At best, Dr. Muscatel testified that an NGRI finding could only excuse the defendant's actions until the point in time when he retrieved the shotgun. RP (7/28/2010) at 116, 120-21.

///

[7] According to Dr. Muscatel, Davis described the incident "as happening very, very fast and feeling like his life was in danger." RP (7/28/2010) at 94-95. Dr. Muscatel explained that the defendant's mental disorder could have impaired his judgment and impulse control, making "him more prone to misperceive what was going on." RP (7/28/2010) at 95.

Instructions

The trial court provided standard pattern jury instructions, which informed the jurors of the law as it relates to attempted first-degree murder, first-degree assault, and the defense of insanity.[8] CP 168-174, 179-183, 194-96. The defense did not object to these instructions.

The trial court carefully explained, "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 167. *See also* CP 174, 191. The defense did not object to this instruction.

The relevant "to convict" instructions included the following language:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 172. *See also* CP 183. The defense did not object to these instructions.

With respect to the instruction that defined a "substantial step," the trial court provided the following standard pattern definition:

> A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

[8] The trial court also instructed the jury on the lesser crimes of attempted second-degree murder and second-degree assault. CP 175-78, 184-190.

CP 173. Again, the defense did not object to this language.

The defense did take exception to the trial court's special verdict instructions that allowed the jury to consider whether the defendant employed a firearm when he allegedly committed the first-degree assault. CP 192, RP (7/29/2010) at 39. According, to the defense, a firearm enhancement on a first-degree assault conviction violated double jeopardy. RP (7/29/2010) at 39; RP (10/19/2010) at 24.

Closing Arguments

During closing argument, the State carefully explained which facts supported the charges. The State argued the first-degree assault was established when Davis suddenly opened fire on Deputy Cortani, engaging the officer in the initial firefight and wounding him with the semi-automatic handgun. RP (7/29/2010) at 41-42, 49-50. The State maintained the attempted murder occurred when Davis decided to retreat to the cabin to retrieve a shotgun, subsequently opened the new weapon to add cartridges or ensure it was loaded, and proceeded to hunt the deputy along the beach. RP (7/29/2010) at 41-42, 44-48.

The defense argued Davis committed a single prolonged assault. RP (7/29/2010) at 76-78. While the defense briefly claimed the State had failed to establish two separate criminal intents, it sought to convince the

jurors that Davis was insane at the time of the shooting. RP (7/29/2010) at 68-78. Thus, the defense argued the defendant required treatment, not a prison term. RP (7/29/2010) at 68-71, 78.

The jury found the defendant guilty as charged. CP 156-57; RP (7/30/2010) at 5. The jury also returned special verdicts, finding (1) the defendant employed a firearm to commit both crimes, and (2) the defendant knew that Deputy Cortani was a law enforcement officer who was engaged in his official duties at the time of the two offenses. CP 152-55.

Sentencing

The sentencing court concluded that the two convictions constituted the same criminal conduct under RCW 9.94A.589. RP (10/19/2010) at 18. According to the court, the defendant also intended to kill Deputy Cortani during the initial gun battle. RP (10/19/2010) at 20-21. As such, the court found that he acted with the same intent during both criminal episodes. RP (10/19/2010) at 21.

The court subsequently imposed a sentence at the low-end of the standard range: 180 months for the attempted murder and 100 months for the first-degree assault. CP 9; RP (10/26/2010) at 20. The court ordered the two sentences to run concurrently. RP (10/26/2010) at 20. The court's order expressly noted the facts did not warrant an exceptional sentence.

CP 8. Finally, the court ordered the defendant to serve 10 additional years pursuant to the two firearm enhancements that the jury previously found.

The defendant appealed his conviction and sentence. The State cross-appealed the court's finding that the two offenses constituted the same criminal conduct.

III. ARGUMENT.

A. THE COURT RESPECTED THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

1. The trial court properly imposed a firearm enhancement on the first-degree assault conviction.

Davis claims the firearm enhancement that follows his conviction for first-degree assault violates double jeopardy because the use of a firearm is an element of the underlying crime. *See* Brief of Appellant at 19. The Washington Supreme Court recently issued an opinion that rejects this same argument. The argument is without merit.

In *State v. Kelly*, the Washington Supreme Court held the "imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm." 168 Wn.2d 72, 84, 226 P.3d 773 (2010). *See also State v. Aguirre*, 168 Wn.2d 350, 367, 229 P.3d 669 (2010) ("Consistent with th[e] holding [in *Kelly*], adding a deadly weapon enhancement to Aguirre's sentence for second

degree assault, an element of which is being armed with a deadly weapon, did not offend double jeopardy.") There is no error.

2. The evidence establishes that the two convictions are not identical in fact.

Davis argues his two convictions for attempted first-degree murder and first-degree assault violated double jeopardy. *See* Brief of Appellant at 16-19. He claims that he only "engaged in a single assault that began when he first drew his *pistol*... and ended when he tossed aside his *shotgun* and called for help." *See* Brief of Appellant at 17 (emphasis added). The argument fails because different facts support the two convictions.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Within this constraint, however, the legislature has the power to define criminal conduct and to specify punishment. *Baldwin*, 150 Wn.2d at 454 (citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).

Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is "whether, in light of legislative intent, the charged crimes constitute the same offense" *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting *In*

re Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). If the relevant statutes do not expressly authorize multiple convictions, the courts apply the *Blockburger* "same evidence" test. *Graham*, 153 Wn.2d at 404 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Under this test, double jeopardy arises if the offenses are identical in both law and fact. *Baldwin*, 150 Wn.2d at 454.

Here, the same evidence test applies because the statutes governing first-degree assault and first-degree attempted murder do not expressly authorize multiple convictions. *See Graham*, 153 Wn.2d at 404.

(a) *Identical in Law.*

Under the same evidence test, offenses must be identical in law to violate double jeopardy. *Baldwin*, 150 Wn.2d at 454. If each offense includes elements not included in the other, the offenses are not identical in law, and the sentencing courts may impose multiple punishments. *In re Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989) (citing *State v. Vladovic*, 99 Wn.2d 413, 423, 622 P.2d 853 (1983)). Elements of the offenses are different where each provision requires proof of a fact, within the context of the case, which the other does not. *See State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); *Orange*, 152 Wn.2d at 817-18.

The offenses at issue here are first-degree assault and attempted first-degree murder. A person is guilty of first-degree assault if he or she, "with intent to inflict great bodily harm ... [a]ssaults another with a firearm or any deadly weapon or by force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). A person is guilty of an attempt to commit a crime if, "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). A person is guilty of first-degree murder when, "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a).

Fundamentally, proof of attempted murder committed by assault will always prove an assault. *Orange*, 152 Wn.2d at 820 (quoting *State v. Valentine*, 108 Wn. App. 24, 29, 29 P.3d 42 (2001), *review denied*, 145 Wn.2d 1022, 41 P.3d 483 (2002)). The assault and murder statutes are directed at the same evil, assaultive conduct. *Valentine*, 108 Wn. App. at 28. Here, the State was required to prove an assaultive act in order to establish attempted murder. As such, the two offenses are identical in law under the *Blockburger* test. *See Orange*, 152 Wn.2d at 820.

///

///

(b) *Identical in Fact.*

While the two offenses are identical in law, they are not identical in fact. The two crimes are not identical because Davis used two different weapons, committed two separate assaults (with time to pause and reflect in between), at two different locations on the Sekiu property. Thus, there is no double jeopardy violation.

Under the same evidence test, there is no double jeopardy unless offenses that are identical in law are also identical in fact. *Baldwin*, 150 Wn.2d at 454. Offenses are not identical in fact if one crime is complete before the defendant commits another crime and if different evidence is used to prove the second crime. *In re Lord*, 152 Wn.2d 182, 194, 94 P.3d 952 (2004). Additionally, factually separate acts charged as separate crimes do not constitute double jeopardy, even if they occur during a relatively short period of time. *See e.g., Fletcher*, 113 Wn.2d at 49 (assault did not take place until after robbery and kidnapping were complete).

In the present case, the assault and attempted murder were based on two distinct episodes. The jury found Davis guilty of assault based on his having shot and wounded Deputy Cortani from the cabin's deck with a semi-automatic handgun. CP 167, 191; RP (7/29/2010) at 41-42, 49-50. The jury found Davis guilty of attempted murder based upon his decision to retreat into the cabin to retrieve a shotgun, open the new weapon to load

a cartridge or make sure it was loaded, march to the deputy's last known location on the beach, and subsequently aim the gun at the officer.[9] CP 167, 174; RP (7/29/2010) at 41-42, 44-48. There was no double jeopardy violation because the present case involved two distinct criminal episodes.

The two cases that Davis cites are easily distinguished. In *Orange*, the two convictions violated double jeopardy because they were based on the *same shot* directed at the same victim. 152 Wn.2d at 820. Here, as previously stated, Davis utilized two different guns and committed two separate attacks.

In *Freeman* the two crimes merged because the defendant assaulted his victim in order to accomplish the subsequent robbery. 153 Wn.2d at 778. Generally, when a predicate offense is an underlying element of another crime, the predicate will merge into the second crime. *See State v. Saunders*, 120 Wn. App. 800, 821, 86 P.3d 232 (2004). Here, the initial firefight (the assault) did not further his subsequent criminal act

[9] There is no question Davis acted with a premeditated intent to kill Deputy Cortani. Dr. Muscatel testified the defendant's acts showed premeditation. RP (7/28/2010) at 114. Additionally, Davis, himself, told emergency personnel that (1) he wished he had killed the officer, and (2) he would have succeeded had his handgun not ran out of ammunition and subsequently jammed. RP (7/22/2010) at 36.

of attempted murder.[10] As such, *Freeman* does not control the present analysis because the two crimes do not merge.

In sum, there is no double jeopardy violation. The two crimes are not identical in fact. The present case involved two separate attacks (with time to reflect in between), with different weapons, at different locations. Thus, the two attacks form distinct, adequate, factual bases for the separate convictions.

B. THE JURY INSTRUCTIONS WERE PROPER.

1. The instructions properly defined a "substantial step" and held the prosecution to its burden of proof.

Davis contends the jury instructions relieved the State of its burden to prove each element of attempted murder beyond a reasonable doubt. *See* Brief of Appellant at 21-22. Specifically, he challenges the wording of Instruction No. 13 – the instruction that defined a "substantial step." *See* Brief of Appellant at 21-23. The argument fails because the appellate courts have previously found this same pattern instructions to be proper.

Whether jury instructions properly state the applicable law is a matter the appellate courts review de novo. *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). This Court reviews a challenged jury

[10] At sentencing, the State argued Davis assaulted the deputy in order to prevent his arrest. He then tried to murder the deputy to eliminate a witness to the earlier assault. *See* CP 75.

instruction within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Instructions are adequate if they allow a party to argue his/her theory of the case, do not mislead the jury, or misstate the law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

A jury instruction that omits or misstates an element of a charged crime is erroneous but may still be harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). An erroneous instruction is harmless if, from the record, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Neder v. United States*, 527 U.S. 1, 15-16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Brown*, 147 Wn.2d at 340-41. Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005).

Davis argues Instruction 13 misstates the law by incorrectly defining an element of attempt murder – a "substantial step." The challenged instruction provided the following definition:

> A substantial step is conduct that strongly *indicates a* criminal purpose and that is more than mere preparation.

CP 173 (emphasis added). This instruction is identical to the pattern jury instruction. *See* WPIC 100.05. However, this definition differs only slightly from that offered by the Washington Supreme Court:

> [C]onduct is not a substantial step "unless it is strongly *corroborative* of *the* actor's criminal purpose."

State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978) (adopting Model Penal Code § 5.01), *superseded by statute on other grounds*, *State v. Woods*, 34 Wn. App. 750, 665 P.2d 895 (1983) (emphasis added).

Davis points out (1) the word "indicate" varies from the word "corroborate" and (2) the indefinite article "a" replaces the definite article "the." *See* Brief of Appellant at 21-22. However, the challenged definition provided by WPIC 100.05 is consistent with *Workman*. *State v. Gatalski*, 40 Wn. App. 601, 613, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985), *abrogated on other grounds*, *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993). Thus, the instruction is proper. There is no error.

Assuming, without conceding, that the instruction was erroneous, the resulting error was harmless. First, Davis admitted that he tried to kill Deputy Cortani. RP (7/21/2010) at 170; RP (7/22/2010) at 36. Thus, his defense at trial was "not guilty by reason of insanity." RP (7/14/2010) at 10; 1RP (7/19/2010) at 15; 1RP (7/20/2010) at 12. In light of the

defendant's admission and proffered defense, the challenged instruction did not affect the trial outcome.

Furthermore, the State provided overwhelming evidence of a "substantial step" to corroborate the defendant's premeditated intent to kill Deputy Cortani. Davis initially engaged the deputy in a firefight and succeeded in wounding him. RP (7/26/2010) at 94-100. After running out of ammunition, Davis retreated into the cabin to retrieve a second firearm. RP (7/26/2010) at 100-01. Davis opened the firearm to either load the shotgun or ensure it was loaded. RP (7/22/2010) at 139-43; RP (7/26/2010) at 46. Davis then proceeded outside the cabin, marching approximately 50 feet to the location where he last saw the wounded deputy. RP (7/26/2010) at 102. When the deputy ordered Davis to drop the shotgun, the defendant turned toward him while aiming the gun in his general direction. RP (7/26/2010) at 103-04. Dr. Muscatel testified that this "separate act" was intentional, deliberate, goal oriented behavior consistent with premeditation. RP (7/28/2010) at 94-95, 114-18. If there was an instructional error, the error was harmless.

2. The court correctly instructed the jury regarding its "duty."

Davis argues the "to convict" instructions, which advised the jury that it had a "duty" to convict upon a finding of proof beyond a reasonable

doubt, violated his right to a jury trial. *See* Brief of Appellant at 28-35. Specifically, he claims the instructions were erroneous because it "deceived the jurors about their power to acquit in the face of sufficient evidence." *See* Brief of Appellant at 34. This argument is without merit because it is not supported by case law.

The purpose of a jury instruction is to provide the jurors with the applicable law to be applied in a case. *State v. Borrero*, 147 Wn.2d 353, 362, 58 P.3d 245 (2002). Again, jury instructions are sufficient if they are not misleading, permit the parties to argue their cases, and properly inform the jury of the applicable law when read as a whole. *Barnes*, 153 Wn.2d at 382.

In *State v. Brown*, this Court rejected the very same argument that Davis now advances. 130 Wn. App. 767, 771, 124 P.3d 663 (2005). In *Brown*, this court held "[t]he power of jury nullification is not an applicable law to be applied in a [criminal prosecution]." *Id.* at 771. This holding relied on the established precedent of *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998), *overruled on other grounds in State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev'd by* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), and *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998)

In *Meggyesy*, the appellate court held an instruction that informed the jury that it had a "duty" to convict if it found the State proved each element of the crimes, beyond a reasonable doubt, did not misstate the law. *Id.* at 700-01. Furthermore, the *Meggyesy* court held that this language did not violate the federal or state constitutions. *Id.* at 701-04. After conducting a thoughtful *Gunwall* analysis,[11] the court recognized there was no independent state constitutional basis to invalidate the challenged instruction.[12] *Id.* at 704. The *Meggyesy* court also noted that article IV, section 16 of the Washington Constitution "is inconsistent with appellants' argument that the jury should be instructed that it may acquit even where it finds that the State has proven, beyond a reasonable doubt, all the elements of the charged crime." *Id. See also State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998) (holding the trial court did not err when instructing the jury that it had a duty to convict if it found the State had proven all the elements beyond a reasonable doubt).

---

[11] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

[12] Davis provides a *Gunwall* analysis in his opening brief, suggesting that the state constitution right to a jury trial offers greater protection than its federal counterpart and, thereby, "prohibits a trial court from affirmatively misleading a jury about its power to acquit." *See* Brief of Appellant at 29-33. In response, the State incorporates by reference the *Gunwall* analysis performed by the *Meggyesy* court, supporting its conclusion that an instruction regarding the jury's "duty" to convict when each element is established beyond a reasonable doubt did not misstate the law, mislead the jury, or violate constitutional guarantees. *See* 90 Wn. App. at 701-04.

Here, the trial court utilized pattern jury instructions to inform the jurors of the law pertaining to attempted murder and assault. CP 168-192. The defense did not object to these instructions. RP (7/29/2010) at 19-21, 34, 37-38. These instructions properly informed the jury that they had a "duty" to return a guilty verdict if it found the State had proved each element of the crimes charged. CP 172, 178, 183, 186. *See also* CP 159. The instructions also reminded the jurors that they had a "duty" to acquit the defendant if (1) they had a reasonable doubt as to any of the elements, or (2) they found the defense had established an NGRI claim by a preponderance of the evidence. CP 172, 178, 183, 186, 195. Presumably, Davis does not contest these favorable references to "duty."

The trial court's instructions regarding "duty" were proper. *See Brown*, 130 Wn. App. at 770-71; *Bonisisio*, 92 Wn. App. at 794; *Meggyesy*, 90 Wn. App. at 701-04. This conclusion is supported by established precedent affirming the same language at issue. Davis makes no effort to distinguish this controlling case law. Furthermore, he makes no argument that these instructions prevented him from arguing his theory of the case. There was no error.

///

///

///

C. DAVIS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Davis argues he received ineffective assistance of counsel. *See* Brief of Appellant at 23-28. He alleges his attorney failed to introduce evidence of his good character in order to support his claims that (1) he lacked premeditated intent to kill the deputy, and (2) he was insane at the time of the shooting. *See* Brief of Appellant at 12-13, 27-28. The argument fails because it is not supported by the record, nor does it satisfy the dual prongs of the *Strickland* analysis.

To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance, and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to satisfy either prong defeats a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

Counsel's performance is deficient only if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To establish prejudice, a defendant must show a reasonable probability that the outcome at trial would have been different but for the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that defense counsel is

competent and provided proper, professional assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Despite the defendant's claims to the contrary, his attorney did introduce testimony regarding his good character. Prior to trial, the defense attorney preserved the right to present evidence of his client's good character and law-abiding behavior in order to contrast that with his manic state in the months leading up to the shooting. 1RP (7/19/2010) at 17. Pursuant to this strategy, the defense called three witnesses, who testified to the defendant's character prior to the onset of his mental illness, and his behavior when he successfully takes his medication. *See* RP (7/28/2010) at 13, 15, 20, 28-29, 36-37, 39, 52, 55, 57, 71, 74, 106-08. The mitigation materials that the defense filed prior to sentencing are repetitive and do not include additional information that was not already introduced at trial. *See* CP 26-70. The defense provided effective representation. The failure to call every available family member and friend did not change the outcome. There is no basis for an ineffective assistance claim.

Moreover, the absence of any prejudice is further highlighted based upon the defense expert's testimony. The crux of the NGRI defense rested on Dr. Muscatel's testimony. While Dr. Muscatel testified that Davis was in a full manic state at the time of the shooting, there was

no evidence of delusional thinking. RP (7/28/2010) at 85-86, 88-89, 112, 121. Thus, an NGRI finding depended on which version of the events the jury decided to accept – *i.e.* that of the defendant or the deputy. RP (7/28/2010) at 94-95, 120. Additionally, Dr. Muscatel clarified that an NGRI finding was only available with respect to the initial firefight because the defendant's subsequent decision to retrieve a shotgun and pursue the deputy along the beach was a "separate act" that suggested "some cognition, planning[,] and purposeful behavior[.]" RP (7/28/2010) at 115-16, 120-21. The jury obviously found the deputy's account more credible and, thereby, convicted the defendant of both crimes.

Cumulative testimony that Davis was a law-abiding, loving family man; a soldier who honorably served his country; a dedicated school district employee who responsibly managed his finances; and a computer whiz would not have changed the outcome at trial. The jury received this information through three defense witnesses, and it still elected to convict Davis of the charges. There is no error.

D. THE COURT ERRED WHEN IT FOUND THE TWO CRIMES CONSTITUTED THE SAME CRIMINAL CONDUCT AND ORDERED THE SENTENCES TO RUN CONCURRENT.

The State filed a cross appeal, challenging the sentencing court's finding that the two crimes constituted "same criminal conduct." Based on

this finding, the lower court ordered the defendant's two base sentences to run concurrently. This was error.

RCW 9.94A.589 sets forth the rules regarding consecutive and concurrent sentences. Generally, the court will order a defendant to serve concurrent sentences when his/her punishment for multiple offenses is set during the same sentencing hearing. RCW 9.94A.589(1)(a).

However, there is an exception to this rule. When a defendant commits two or more serious violent offenses, he/she must serve consecutive sentences. RCW 9.94A.589(1)(b).[13] Any departure from this rule requires an exceptional sentence. RCW 9.94A.535 (2008).[14]

In the present case, Davis committed two serious violent offenses: first-degree assault and first-degree attempted murder. CP 6, 156-57; RP

---

[13] RCW 9.94A.589(1)(b) provides:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. *All sentences imposed under (b) of this subsection shall be served consecutively to each other* and concurrently with sentences imposed under (a) of this subsection.
>
> (emphasis added).

[14] *See* Laws of Washington 2008 c. 276 § 303.

(7/30/2010) at 5. *See also* RCW 9.94A.030(45)(a)(i), (v), (ix) (2008).[15] Thus, the question is whether these two serious violent offenses arose "from separate and distinct criminal conduct."

Two crimes are "separate and distinct" if they do not satisfy the factors that constitute "same criminal conduct" as defined by RCW 9.94A.589(1)(a). *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *State v. Price*, 103 Wn. App. 845, 855, 14 P.3d 841 (2000). RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." The absence of any one of these three factors prevents a finding of same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Generally, the appellate courts narrowly construe RCW 9.94A.589(1)(a) and disallow most claims that multiple offenses constitute the same criminal act. *Porter*, 133 Wn.2d at 181. The single clear exception is the defendant's "repeated commission of the *same crime* against the same victim over a short period of time." *Porter*, 133 Wn.2d at 181 (citing 13A Seth Aaron Fine, *Washington Practice* § 2810 at 112 (Supp. 1996)) (emphasis in original). A reviewing court will reverse a sentencing court's decision of "same criminal conduct" if it finds a clear

[15] *See* Laws of Washington 2008 c. 276 § 309.

abuse of discretion or misapplication of the law. *Porter*, 133 Wn.2d at 181.

Here, the sentencing court abused its discretion when it concluded the two offenses constituted the same criminal conduct. First, Davis did not repeatedly commit the *same crime* against Deputy Cortani. Instead, he committed two separate and distinct criminal acts. Davis initially assaulted Cortani per RCW 9A.36.011. After an opportunity to pause and reflect on his criminal conduct, he then attempted to kill Cortani per RCW 9A.28.020 and 9A.32.030. The present case does not fall under the single clear exception to the narrow construction afforded RCW 9.94A.589(1)(a). *See Porter*, 133 Wn.2d at 181.

Second, the two crimes happened in two different places. Davis assaulted Deputy Cortani when he fired his handgun from his position on the cabin's deck. RP (7/26/2010) at 94-100. Davis committed attempted murder when he decided to retrieve a shotgun and hunt for Cortani on the beach, approximately 50 feet away from the cabin. RP (7/21/2010) at 95; RP (7/26/2010) at 100-104. The fact Davis committed two separate crimes at two different locations on the Sekiu property precludes a finding of same criminal conduct. *See Porter*, 133 Wn.2d at 181.

Finally, Davis exhibited two different mental states with respect to his crimes. The relevant inquiry is to what extend did the defendant's

criminal intent, when viewed objectively, change from one crime to the next. *Tili*, 139 Wn.2d at 123. The reviewing court must objectively view each underlying statute and determine whether the requisite intents are the same or different for each count. *Price*, 103 Wn. App. at 857. If they are the same, the appellate court then reviews the facts to determine whether the intent was the same or different with respect to each count. *Price*, 103 Wn. App. at 857. When dealing with sequentially committed crimes, this inquiry can be resolved, in part, by determining whether one crime furthered the other. *Price*, 103 Wn. App. at 857. If two crimes were committed for different purposes, then a "same criminal conduct" finding is untenable. *Price*, 103 Wn. App. at 857.

Here, Davis committed two crimes that require different criminal intents. First-degree murder requires premeditated intent to kill. RCW 9A.28.020; RCW 9A.32.030. First-degree assault requires intent to inflict great bodily harm. RCW 9A.36.011. The State proved Davis intended to inflict great bodily harm when he repeatedly fired a semi-automatic handgun at Deputy Cortani, wounding him two times. RP (7/26/2010) at 94-100. The State established the criminal intent changed when Davis retreated to the cabin and subsequently emerged with a loaded shotgun. RP (7/26/2010) at 100-104; RP (7/28/2010) at 114.

While the sentencing judge personally believed Davis intended to kill the deputy during the initial firefight, *see* RP (10/19/2010) at 20-21, the evidence did not support this conclusion beyond a reasonable doubt. The State acknowledges Davis told the medics that he wished he had killed the deputy, and would have succeeded had his first weapon not run out of ammunition and jammed. RP (7/21/2010) at 170; RP (7/22/2010) at 36. However, this statement was made in hindsight, after the defendant failed to kill the deputy with a shotgun. The testimony of both Deputy Cortani and Dr. Muscatel suggested that Davis only made a spur of the moment decision when he turned and fired his handgun.

Assuming, without conceding, that Davis intended to kill Deputy Cortani during the initial firefight, the State submits his two crimes remain separate and distinct. The appellate courts have repeatedly held that a defendant possesses separate intents when he/she has the opportunity to pause and reflect after committing his/her first criminal act but before electing to commit a second crime. *In re Rangle*, 99 Wn. App. 596, 600 P.2d 620 (2000); *State v. Price*, 103 Wn. App. 845, 14 P.3d 841 (2000); *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In *Grantham*, the defendant used force to anally rape his victim. *Id.* at 856. After completing the rape, the defendant stopped and withdrew. *Id.* The victim curled into a ball in the corner of a room. *Id.* The defendant

then threatened the victim, warning her not to report the crime. *Id.* The victim begged the defendant to take her home. *Id.* When the defendant demanded oral sex, the victim refused. *Id.* The defendant then utilized physical violence to accomplish the second rape (fellatio). *Id.* The appellate court held:

> Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further act. He chose the latter, forming a new intent to commit the second act.

Id. at 859. The appellate court affirmed two rapes did not constitute same criminal conduct because they were sequential, not simultaneous or continuous." *Id.*

In *Rangle*, the defendant was a passenger in a vehicle. 99 Wn. App. at 598. The defendant fired a gun at a rival gang's car. *Id.* When the victims' vehicle crashed, the defendant turned around, approached the car, and fired a second time. *Id.* at 598, 600. The appellate court held the defendant was able to form a new criminal intent because his acts were sequential, not simultaneous or continuous. 99 Wn. App. at 600.

In *Price*, the defendant stopped his truck, exited his vehicle, approached the car in which his victims were parked, and fired a single bullet into the victims' car. 103 Wn. App. at 849. The victims fled the scene, racing to the nearby interstate. *Id.* The defendant returned to his

truck, pursued his victims onto the interstate's on-ramp, pulled alongside the victims' vehicle, and fired two additional shots. *Id.* at 849-50. The appellate court highlighted the defendant's conscious choice to return to his vehicle and pursue his victims in order to commit the second shooting. *Id.* at 858. Thus, the defendant's multiple counts did not constitute the same criminal conduct because the defendant had additional time to form a new criminal intent. *Id.* at 858-59. Each shooting was a complete criminal act in and of itself. *Id.* at 859.

Like the defendants in *Grantham*, *Rangle*, and *Price*, Davis had the opportunity to reflect on his actions. He had time to terminate his criminal conduct, or choose to commit further criminal acts. After his first weapon ran out of ammunition and jammed, he retreated to the cabin and retrieved a second weapon. RP (7/26/2010) at 100-02. He returned to the battlefield, despite (1) having a vehicle available to facilitate his escape, RP (7/21/2010) at 54, 125, 138; (2) having wounded the deputy, RP (7/26/2010) at 94, 97; and (3) having watched the deputy run away, RP (7/26/2010) at 95-96. He then pursued his victim with a new weapon. RP (7/26/2010) at 102. Per the testimony of his own expert, the decision to reengage the sheriff's deputy was a "separate act," which allowed the defendant to consider the wrongfulness of his actions. RP (7/28/2010) at 94-95, 114-18. The defendant's two crimes were sequential, not

simultaneous or continuous, proving he formed two different intents. Furthermore, the initial assault did not further the attempted murder. *See Grantham*, 84 Wn. App. at 859. The trial court erred when it found the two offenses constituted the same criminal conduct.

Having established that the defendant's crimes arose "from separate and distinct" acts, the sentencing court could only run the prison terms concurrent to one another if it found facts justified an exceptional sentence. RCW 9.94A.535 (2008). However, the sentencing court explicitly refused to impose an exceptional sentence. CP 8. As such the court erred when it imposed concurrent sentences.

The sentencing court misapplied the three part "same criminal conduct" test. Not only do the two statutes in question require different mental states, but Washington's case law does not support the finding that Davis acted with the same criminal intent. The evidence proves the defendant's intent, objectively viewed, changed or formed anew between the initial firefight and subsequent hunt with a shotgun. This Court should remand for resentencing, instructing the court to run the two underlying prison terms consecutive to one another.

///

///

///

IV. CONCLUSION.

The State respectfully asks this Court to affirm the conviction for (1) attempted first-degree murder, and (2) first-degree assault. However, the State requests that this Court remand for resentencing, instructing the lower court that the two underlying convictions do not constitute same criminal conduct and must run consecutive to one another.

DATED this 30th day of January, 2012.

DEBORAH S. KELLY, Prosecuting Attorney

Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney

CLALLAM COUNTY PROSECUTOR

January 30, 2012 - 3:13 PM

Transmittal Letter

Document Uploaded: 413574-Respondent's Brief.pdf

Case Name: State v. Scott Davis

Court of Appeals Case Number: 41357-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Doreen K Hamrick - Email: **dhamrick@co.clallam.wa.us**

A copy of this document has been emailed to the following addresses:

bwendt@co.clallam.wa.us

backlundmistry@gmail.com